

## Funding and Cancellation Dates in Multiyear Contracts-Lessons Learned in FY 02

A multiyear contract, as defined in FAR section 17.103, is "... a contract for the purchase of supplies or services for more than 1, but not more than 5, program years.... The key distinguishing difference between multi-year contracts and multiple year contracts is that multi-year contracts, defined in the statutes cited at [FAR] 17.101, buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first."

Further, "[a] multi-year contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to the contractor if appropriations are not made." It is this provision that performance is contingent upon the appropriation of funds, together with delayed and reduced funding during repeated continuing resolutions, that has caused unanticipated problems this year.

Among the many requirements unique to multiyear contracts, FAR section 17.109(a) requires that the clause at FAR 52.217-2 be inserted in the solicitation and contract whenever a multiyear contract is contemplated (although FAR section 17.104(b) allows the agency head to authorize modification of the clause).

Paragraph (a) of this clause provides that "'[c]ancellation,' as used in this clause, means that the Government is canceling its requirements for all supplies or services in program years subsequent to that in which notice of cancellation is provided. Cancellation shall occur by the date or within the time period specified in the Schedule, unless a later date is agreed to, if the Contracting Officer-

(1) Notifies the Contractor that funds are not available for contract performance for any subsequent program year; or

(2) Fails to notify the Contractor that funds are available for performance of the succeeding program year requirement." In addition, all program years except the first are subject to cancellation, and a cancellation ceiling must be established for each program year subject to cancellation (See FAR sections 17.103, 17.106-1(c), and 52.217-2.).

The lessons learned concern the date(s) selected for funding of the subsequent program years in multiyear contracts. Failure of the government to obligate the total amount of funds by the date(s) specified in the multiyear contract will result in complete cancellation of all subsequent (unfunded) program years of the contract unless the contractor agrees to extend the date(s) via a bilateral contract modification.

Unfortunately, the agreement to change the date(s) is entirely at the contractor's discretion, and the government has little or no "leverage." (This is true especially in a sole source contractor situation.)

Because of the nature of a multiyear contract, it is very likely that if the contract is cancelled and a subsequent contract must be awarded to fulfill the cancelled requirements, the subsequent contract will be awarded with higher prices. Thus, the contractor's willingness to extend the funding and cancellation date(s) in the multiyear contract will depend upon whether it is more advantageous to the contractor to continue performance under the current multiyear contract or "gamble" on being awarded a subsequent contract with higher prices. Unlike termination for the convenience of the government, in this situation continuance or cancellation of the multiyear contract is at the contractor's convenience.

Therefore, the lesson to be learned is to consider very carefully when choosing the date(s) by which the government must obligate the funds for subsequent program years in multiyear contracts to prevent cancellation. Until this fiscal year, a date in December was assumed to be relatively "safe," because it was anticipated that this was long enough after the beginning of the fiscal year for the annual appropriation and authorization acts to have been passed and the funds to have been made available for obligation.

This fiscal year has proven that assumption to be false. In light of this experience, it is strongly recommended that the dates for obligation of funds for subsequent program years and, consequently, the cancellation dates, in multiyear contracts be no earlier than the second quarter of the fiscal year to prevent contract cancellation by failing to "...notify the Contractor that funds are available for performance of the succeeding program year requirement."

Other problems also arise when the total amount of funds for the succeeding program year of a multiyear contract is not available by the contract cancellation date. This may occur when there is a continuing resolution because the appropriations and authorization acts have not been passed and signed for the new fiscal year.

One problem is that if the government and the contractor bilaterally agree to obligate part of the succeeding program year funds when extending the contract cancellation date of the multiyear contract, any items acquired with that partial funding must comply with the DoD full funding policy. (See DoD Financial Management Regulation 7000.14-R, Volume 2A, section 010202 and DoDD 7200.4 regarding the DoD full funding policy. See DoD Financial Management Regulation 7000.14-R, Volume 2A, section 010203 regarding multiyear contracts, especially at "C. DoD Requirements," which states that "...multiyear procurement contracts will comply with full funding" except for economic order quantity procurement and advance procurement for long leadtime items.) A second problem is that while under a continuing resolution authority, any funding provided may be restricted to

prevent acquisition of "more" of any type of units in a subsequent program year than were acquired in the previous fiscal year.

(See an explanation of the "current rate," as used continuing resolutions, in Chapter 8 of the GAO Principles of Appropriations Law: Second Edition ("red book").)

This may be inconsistent with the requirements of the multiyear contract which, again, would require the contractor's agreement and a bilateral contract modification to resolve.

In summary, careful consideration of the subsequent program years' funding and cancellation dates before award of a multiyear contract may prevent very difficult and frustrating "one-sided" negotiations with the contractor later.

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